IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CLEVON TILGHMAN, III

Plaintiff, C.A. No. K10C-10-022 WLW

v.

DELAWARE STATE UNIVERSITY, a governmental corporate entity; CORPORAL ERIK FORAKER, individually and in his official capacity; : THE STATE OF DELAWARE, a governmental entity; THE DEPART-MENT OF SAFETY AND HOMELAND: SECURITY OF THE STATE OF DELAWARE, an agency of the State of: Delaware; THE DIVISION OF THE STATE POLICE, a division of the Department of Safety and Homeland

Security of the State of Delaware; a SECOND DELAWARE STATE POLICE TROOPER, JOHN DOE, individually and in his official capacity; :

CORPORAL JEFFREY WHITMARSH, : individually and in his official capacity,

Defendants.

Submitted: May 31, 2012 Decided; August 15, 2012

ORDER

Upon Defendants' Motions for Summary Judgment. Granted in part; denied in part. Upon Plaintiff's Motion to Amend Complaint. Denied.

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William D. Fletcher, Jr., Esquire and Noel E. Primos, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for Plaintiff.

Michael W. Arrington, Esquire of Parkowski Guerke & Swayze, P.A., Wilmington, Delaware; attorney for Defendant Delaware State University.

Michael F. McTaggart, Esquire, Department of Justice, Wilmington, Delaware; attorney for Defendants Corporal Erik Foraker, The State of Delaware, the Department of Safety and Homeland Security of the State of Delaware, the Division of the State Police, and Corporal Jeffrey Whitmarsh.

WITHAM, R.J.

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ISSUE

_____Presented to the Court is whether the Court should grant the motion for summary judgment filed by Defendants Corporal Erik Foraker, individually and in his official capacity, the State of Delaware, the Department of Safety and Homeland Security, the Division of State Police, and Corporal Jeffery Whitmarsh, individually and in his official capacity (hereinafter collectively referred to as "State Defendants") and whether Delaware State University's motion for summary judgment should be granted.

FACTS¹

Clevon Tilghman, III (hereinafter "Plaintiff") was a full-time student at Delaware State University (hereinafter "DSU") in the Fall of 2008 at the time of the incident at issue. On October 18, 2008, DSU was in the midst of its homecoming festivities, which included a formal dance at Memorial Hall. In connection with the dance, DSU obtained security and public safety assistance from the Delaware State Police (hereinafter "DSP"). On the date in question, Corporal Erik Foraker (hereinafter "Foraker") and his trained K-9 "Speed" conducted a sweep of Memorial Hall. This sweep included the bathrooms in the building. Though the number of times is disputed, before sweeping the men's restroom, Foraker announced the presence of the K-9 unit at least once. Upon entry, Foraker states that he noticed the smell of burnt marijuana, though Plaintiff was not found in possession of any drugs or drug paraphernalia. The K-9 entered the restroom, paused at the last stall, and

¹These are the facts construed in the light most favorable to the non-moving party as required by the summary judgment standard. Most of these facts are disputed.

entered the stall. The toilet flushed. Thereafter, the K-9 latched on to Plaintiff, biting him. Foraker forced the stall door open, removed the K-9 from the stall while the dog was still attached to Plaintiff, and then commanded the dog to release Plaintiff. Plaintiff was held by Foraker and searched. Emergency medical personnel were dispatched, and they assessed Plaintiff. Plaintiff alleges that he refused treatment because Foraker stated that Plaintiff would have to go to jail if he received treatment. Plaintiff states he was handcuffed but was not read his *Miranda* warnings. Foraker then drove Plaintiff to DSP Troop 3, allegedly stopping twice to make cell phone calls.

Plaintiff was charged in the Court of Common Pleas with criminal trespass second degree and resisting arrest. The trespass charge was dismissed by way of *nolle prosequi*, and Plaintiff obtained probation before judgment on the resisting arrest charge.

Additionally, Plaintiff brings defamation claims surrounding statements made by Corporal Jeffery Whitmarsh (hereinafter "Whitmarsh"), in his capacity as a State Public Information Officer, after Plaintiff's arrest.

Standard of Review

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.² The facts must be viewed in the light most favorable to the non-

²Super. Ct. Civ. R. 56(c).

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moving party,³ and all reasonable inferences must be drawn in favor of the non-moving party.⁴ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.⁵ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.⁶ The movant bears the burden of demonstrating that a genuine issue of material fact does not exist.⁷ Should the movant satisfy his burden, then the non-movant must prove that genuine issues of material fact exist.⁸ Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant.⁹ If the non-moving party fails to make a sufficient showing on an essential element of his or her case for which he or she has the burden of proof, the moving party is entitled to judgment as a matter of law.¹⁰

³Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 780 (Del. Super. 1995).

⁴Lundeen v. Pricewaterhousecoopers, LLC, 2006 WL 2559855 (Del. Super. Aug. 31, 2006).

⁵Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. 1962).

⁶Wooten v. Kiger, 226 A.2d 238, 239 (Del. 1967).

⁷Lundeen, 2006 WL 2559855, at *5 (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

⁸*Id.* (citing *Moore* 405 A.2d at 681).

⁹*Id.* (citing *Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

¹⁰Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991).

DISCUSSION

State Defendants move for summary judgment on all six of Plaintiff's counts. They are as follows: negligence, assault and battery, false imprisonment, intentional infliction of emotional distress, defamation, and violation of 42 *U.S.C.* § 1983. In addition, Plaintiff raises the application of strict liability under 9 *Del. C.* § 913 after the Court heard oral argument on State Defendants' motion for summary judgment.¹¹ Each count is evaluated in turn.

Count I- Negligence

_____State Defendants argue that although this count seeks judgment against all Defendants, Plaintiff makes no legal claim against State Defendants. In order to sufficiently plead negligence, a defendant must be informed of: (1) What duty, if any, was breached; (2) who breached it; (3) what act or failure to act breached the duty; and (4) the party upon whom the act was performed.¹² Plaintiff does not specifically allege that the State of Delaware, the Department of Safety and Homeland Security of the State of Delaware, the Division of State Police, or Sergeant Jeffery Whitmarsh, breached any duty on this count. Indeed, Plaintiff associates Foraker with DSU calling him a servant, employee, agent, and/or apparent agent of DSU.¹³ Nevertheless, paragraph 83 of Plaintiff's complaint realleges the previous 82 paragraphs reciting the various facts and circumstances of the case, including

¹¹The statute was formerly located at 7 *Del. C.* § 1711.

¹² Myer v. Dyer, 542 A.2d 802 (Del. Super. 1987); see Super. Ct. Civ. R. 9(b).

¹³Compl. ¶¶ 85, 87.

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Foraker's actions on the day in question. Further, Plaintiff sued Foraker in his individual and official capacities. The combination of these two factors was sufficient to meet the requirements of Superior Court Civil Rule 9(b) as to the State of Delaware, the Department of Safety and Homeland Security of the State of Delaware, and the Division of State Police. There is no colorable allegation as to Whitmarsh for negligence, however. Insofar as Plaintiff attempts to refer to him in the "wherefore" clause of paragraph 88, the negligence claim against him is dismissed.

As to Foraker, in his individual and official capacities, State Defendants contend that the public duty doctrine¹⁵ or the State Tort Claims Act¹⁶ bars an action for negligence in this case. After review of the relevant case law and careful thought on this matter, the Court does not believe that the public duty doctrine applies to this case.¹⁷ The latest case to discuss the public duty doctrine explains, "The public duty

¹⁴The purpose of Superior Court Civil Rule 9(b) is to guard fairness by ensuring that an opponent be informed of charges so as to be able to prepare a defense to them. *C & P Tel. Co. v. Chesapeake Utils. Corp.*, 436 A.2d 314 (Del. 1981). This purpose has certainly been fulfilled here.

¹⁵Castellani v. Delaware State Police, 751 A.2d 934 (Del. Super. 1999), aff'd, 744 A.2d 987 (Del. 1999) (TABLE).

¹⁶10 Del. C. § 4001.

¹⁷See J.L. v. Barnes, 33 A.3d 902 (Del. Super. 2011) (public duty doctrine precluded Plaintiff's claims as they related to discretionary actions or omissions by individual employees of two state agencies who released a minor with an extensive history of violent behavior to practice football at a high school where he subsequently raped and assaulted a female trainer); Higgins v. Walls, 901 A.2d 122 (Del. Super. 2005) (public duty doctrine did not apply where privately owned commercial entity was contracted by the State to provide hunting licenses to the public for a fee); Castellani v. Delaware State Police, 751 A.2d 934 (Del. Super. 1999) (public duty doctrine applied

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doctrine provides that when a public entity or employee owes a duty to the public at large rather than a specific individual, no member of the public may pursue a claim against that entity or employee unless the claims are based upon non discretionary acts or failures to act."¹⁸ The case goes on to state:

The claims relating to discretionary actions or failures to act by individual defendants, however, cannot survive the public duty doctrine unless Plaintiff can establish that : (1) Defendants assumed an affirmative duty to act on behalf of Plaintiff; (2) Defendants had knowledge that inaction would lead to harm; (3) Defendants had direct contact with Plaintiff; and (4) Plaintiff justifiably relied on Defendants' undertaking.¹⁹

With regard to the public duty doctrine, there are several important points to provide context. First, generally, the doctrine of sovereign immunity provides that a state cannot be sued without its consent.²⁰ 18 *Del. C.* § 6511 was an attempt by

where Delaware State Police failed to respond to multiple reports of malfunctioning traffic signal and Plaintiff was killed in a subsequent auto accident at intersection); *Johnson v. Indian River Sch. Dist.*, 723 A.2d 1200 (Del. Super. 1998) (public duty doctrine applied where school district and Division of Motor Vehicles failed to issue restrictions on license of teenager afflicted with polio who subsequently struck and killed child while driving his automobile), *aff'd*, 723 A.2d 397 (Del. 1998) (TABLE); *Patton v. Simone*, 1993 WL 144367, at *12 (Del. Super. Mar. 22, 1993) (quoting *Wooters v. Jornlin*, 477 F. Supp. 1140, 1144 (D. Del. 1979) ("[I]f one wishes to claim a right to a general government service, he must show that the provider of the service has a duty to provide that service. If the furnishing of the service is left to the discretion of the provider then there can be no entitlement."))

¹⁸Barnes, 33 A.3d 902, 916 (Del. Super. 2011).

 $^{^{19}}Id.$

²⁰Doe v. Cates, 499 A.2d 1175, 1176 (Del. 1985).

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Delaware's legislature to consent to suit where the state was covered by the State Insurance Program.²¹ Here, it appears that DSP is covered by insurance.²² Where the State has waived immunity, the State Tort Claims Act, 10 *Del. C.* § 4001 applies to limit that liability.²³ Second, the public duty doctrine is a common law creation that arose after the advent of the State Tort Claims Act.²⁴ Although the public duty doctrine arose out of a federal case in the context of a *claim of right* to building inspections,²⁵ the State now attempts to apply it to a case in which the actions of a police officer with a K-9 may have been reckless. The Court views with special interest the cases of *Elliot v. Dunn*²⁶ and *Cornish v. Delaware State Police*.²⁷ Decided several years after the public duty doctrine entered into use in Delaware, the facts of *Elliot* and *Cornish* are quite similar to those in this case, but the public duty doctrine

²¹*Id.* at 1181.

²²The Court provided State Defendants with the opportunity to file an affidavit of no insurance. State Defendants chose not to do so. State Defs.' Letter to the Court ¶8 (Apr. 18, 2012).

²³Cates, 499 A.2d at 1181.

²⁴See 61 Del. Laws ch. 431, § 1 (1979); Patton, 1993 WL 144367 (1993).

²⁵*Patton*, 1993 WL 144367, at *12 (Del. Super. Mar. 22, 1993) (quoting *Wooters*, 477 F. Supp. at 1144)). *Wooters* utilized the public duty doctrine to state that there was no property right to building inspections. 477 F. Supp. at 1143-44. *Patton* used the public duty doctrine for the first time in Delaware's state courts to find that the City of Wilmington did not have a duty to inspect an unprotected elevator shaft in a private building. *Patton*, 1993 WL 144367, at *13.

²⁶1995 WL 411406 (Del. Super. July 6, 1995).

²⁷1996 WL 453304 (Del. Super. June 19, 1996).

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was not raised as a defense.²⁸ The Court firmly believes that the State may defend itself by the methods it sees fit. Given the similarity of *Elliot* and *Cornish* to this case, however, the Court has reached the understanding that the public duty doctrine was not as expansive as it has now become (at least from the State Defendants' perspective).

The Delaware General Assembly created the State Tort Claims Act "[w]ith an apparent intent to set in motion a program which would alleviate the injustice created by the doctrine [of sovereign immunity]."²⁹ Indeed, the Delaware Supreme Court once noted:

But neither the certainty of the doctrine [of sovereign immunity] in law nor its longevity necessarily makes its application right or just. On the contrary, it is fair to say that our Courts have applied this kind of immunity with express reluctance and with an invitation to the General Assembly to remove it. The reason, of course, is that the State, acting through its agents, [d]oes cause injury to others for which, in justice, it should be legally responsible. And a concept which draws its strength from the notion that the State is outside the law is hardly at home in our third century of independence.³⁰

²⁸In *Elliot*, a Delaware State Trooper opened the door of her vehicle and her K-9 escaped, attacking the plaintiff in that case. 1995 WL 411406, at *1. The Trooper's defense to the negligence action was the State Tort Claims Act. *Id.* at *2. In *Cornish*, the Officer sent his K-9 after a driver who ran him off of the road during a traffic stop with another vehicle and subsequently ran from the Officer in a trailer park. 1996 WL 453304, at *1. In chasing the driver, it was alleged that the K-9 became confused and attacked an innocent bystander. *Id.* The Officer's defense to the negligence action was the State Tort Claims Act. *Id.* at *3-4.

²⁹Cates, 499 A.2d at 1177.

³⁰Pajewski v. Perry, 363 A.2d 429, 433 (Del. 1976).

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And yet, despite the former exhortation of the Delaware Supreme Court that the State should not be outside the law, and despite the General Assembly's passage of the State Tort Claims Act, the public duty doctrine has arisen from the Judicial Branch to create a new barrier to holding the State accountable.

Although, as the Court has made clear, it is not particularly fond of the timing or the adamantine effect that the public duty doctrine has had on Delaware case law, the Court must, nonetheless, apply it to the case at bar based on the principle of *stare decisis*. In reviewing the first step of whether DSP and Foraker owed a duty to perform services to the public at large or to an individual, the Court finds that DSP and Foraker agreed to accept an offer to perform a specific duty, at a specific time, in a specific area in exchange for payment from DSU. In doing so, the Court finds that the public duty doctrine is not applicable because the duty owed was not to the public at large, but rather to a specific group: the Delaware State University campus community attending the Homecoming festivities on the evening in question.³¹

Under the State Tort Claims Act, 10 *Del. C.* § 4001, a state actor is immune when an act or omission complained of:

(1) [A]rose out of and in connection with the performance of an official duty . . . involving the exercise of discretion . . . ; (2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and (3) The act or omission

³¹The Court understands that the DSU campus community attending Homecoming festivities on the evening in question does not constitute an individual. However, the aforementioned group does not constitute the public at large either. Since the duty owed was not to the public at large, the public duty doctrine cannot apply.

complained of was done without gross or wanton negligence.³²

As is explained further below, Foraker was discharging an official duty. Foraker reported to this special event at DSU in uniform with all of his equipment, his K-9, and in his state issued car. Records show that over 40 other officers performed duties for DSU's Homecoming festivities over two days.³³ It is true that DSU paid the DSP and that the DSP in turn paid the officers who rendered service. These duties may have constituted a special assignment or extra duty, but such an agreement between the DSP and DSU to provide DSU with a DSP security detail does not make such service "unofficial" for the purposes of the State Tort Claims Act. There is no indication on the record that the DSP officers on site were asked to not enforce certain laws. By all indications, the DSP officers, including Foraker, acted pursuant to their training and in their official capacities.

These special assignments in which the DSP provides members of its force with additional duties happen many times per year. In addition to the factors mentioned above, there are important considerations of public policy that lend strength to the Court's stance on this issue. To label the duties rendered in the circumstances described above "unofficial," would have wide ranging implications. Fewer officers would be willing to serve at special events because the officers who did serve would be in significant danger of personal liability. They would not have the same ability to stop, obtain information from, or arrest people at these events.

³²10 *Del. C.* § 4001.

³³Pl. Resp. Ex. P.

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An official duty involves an exercise of discretion when "there is no hard and fast rule as to [the] course of conduct that one must or must not take."³⁴ Although Foraker was ordered to search Memorial Hall, how he searched was not subject to a hard and fast rule. In short, his methods were at his discretion. The building search, whether for drugs or bombs or both, was executed in good faith.

"Gross negligence is a higher level of negligence representing 'an extreme departure from the ordinary standard of care." An action or omission is considered wanton "only where it reflects a 'conscious indifference' or an 'I-don't-care attitude." Viewing the facts in the light most favorable to the non-moving party, the Court cannot rule out that Foraker's actions or omissions were done with gross or wanton negligence. Therefore, with the exception of Whitmarsh as denoted above, State Defendants' motion for summary judgment on Plaintiff's negligence claim is hereby denied.

Count II- Assault and Battery

_____The tort of assault requires that the actor act with the intent of causing a harmful or offensive contact with the person of another, or an imminent apprehension of such contact, and the person is thereby put in imminent apprehension of such

³⁴*J.L. v. Barnes*, 33 A.3d 902, 914 (Del. Super. 2011) (quoting *Scarborough v. Alexis duPont High Sch.*, 1986 WL 10507, at *2 (Del. Super. Sept. 17, 1986)).

³⁵Browne v. Robb, 583 A.2d 949, 953 (Del. 1990) (citing William L. Prosser, Handbook of the Law of Torts 150 (2d ed. 1955)).

³⁶ Adams, 779 F. Supp. 2d at 395 (citing Foster v. Shropshire, 375 A.2d 458, 461 (Del. 1977)).

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contact.³⁷ "In essence, the tort of battery is the intentional, unpermitted contact on the person of another which is harmful or offensive."³⁸ State contends that there is absolutely no evidence to support the allegation that Foraker acted with intent to injure or scare Plaintiff. Upon the Court's review of the facts, the highest *mens rea* supportable, when the facts are viewed in the light most favorable to Plaintiff, is recklessness. The Court cannot find any fact on record to indicate that Foraker acted with the intention that the K-9 Speed bite Plaintiff or with the intention that Speed continue to bite Plaintiff. Therefore, State Defendants' motion for summary judgment on the assault and battery claim is hereby granted.

Count III- False Imprisonment

____State Defendants contend that since Foraker obtained an arrest warrant for Plaintiff for resisting arrest and criminal trespass second degree, the claim for false imprisonment is barred. Indeed, *Boulden v. Turner* stands for the assertion that when a lawful arrest has been made, an action for false imprisonment will not lie.³⁹ Here, the Plaintiff's arrest was lawfully made pursuant to an arrest warrant. Therefore, an action for false imprisonment is not permitted, and State Defendants' motion for summary judgment on the false imprisonment claim is hereby granted.

 $^{^{37}}$ RESTATEMENT (SECOND) OF TORTS § 21 (1965); see Liggett Group, Inc. v. Affiliated FM Ins. Co., 2001 WL 1456811, at *6 (Del. Super. Sept. 12, 2001).

³⁸Brzoska v. Olson, 668 A.2d 1355, 1360 (Del. 1995).

³⁹2007 WL 3378662, at *4 (Del. Super. Apr. 12, 2007).

Count IV- Intentional Infliction of Emotional Distress

The Delaware Supreme Court has endorsed § 46 of the Restatement (Second) of Torts in defining intentional infliction of emotional distress.⁴⁰ What the Restatement terms "outrageous conduct causing severe emotional distress" is defined as, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."⁴¹ Importantly, so long as the conduct is extreme or outrageous, the actor's acts may be reckless and still be recoverable.⁴² "Outrageous behavior is conduct that exceeds the bounds of decency and is regarded as intolerable in a civilized community."⁴³ "The law intervenes when the distress inflicted is so severe that no reasonable [person] could be expected to endure it."⁴⁴ Courts must consider intensity and duration in deciding whether the conduct has reached this level.⁴⁵

The Court believes that there is a genuine issue of material fact regarding whether Foraker's conduct surrounding the arrest could be deemed reckless and

 $^{^{40}}$ See Goode v. Bayhealth Medical Center, Inc., 931 A.2d 437, 2007 WL 2050761, at *2 (Del. 2007) (TABLE).

⁴¹Restatement (Second) of Torts § 46.

⁴²*Goode*, 2007 WL 2050761, at *2.

 $^{^{43}}Id.$

 $^{^{44}}$ Id. (quoting Restatement (Second) of Torts § 46, cmt. j.).

⁴⁵Mandelaka v. Boyd, 1993 WL 258798, at *1 (Del. Super. June 14, 1993).

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sufficiently outrageous to justify recovery under this theory in viewing the evidence in the light most favorable to the non-moving Plaintiff. Insofar as the intentional infliction of emotional distress claim attempts to reach allegedly defamatory statements by Whitmarsh, this portion of the claim is barred by Delaware law.⁴⁶ Therefore, for the events surrounding the arrest itself, summary judgment is denied on this count.

Count V- Defamation/Libel/Slander

_____State Defendants bring this motion for summary judgment on Plaintiff's defamation claim. This claim surrounds a WMDT television report and web site news article from October 22, 2008 and an article published in the Dover Post on October 29, 2008. The only statements from Foraker involved in Plaintiff's defamation claims appear to be from Justice of the Peace Court records obtained by the Dover Post. Allegedly defamatory statements made to a judicial officer for the purpose of initiating a criminal prosecution are absolutely privileged. As such, State Defendants' motion for summary judgment as to Foraker on Plaintiff's defamation claim is hereby granted.

In terms of the defamation claim against Whitmarsh, Plaintiff identified alleged defamatory statements in paragraph 73. The paragraph recounts a passage from an

⁴⁶See Barker v. Huang, 610 A.2d 1341, 1351 (Del. 1992) (independent action for intentional infliction of emotional distress does not lie where the gravamen of the complaint sounds in defamation).

⁴⁷ Adams v. Selhorst, 779 F. Supp. 2d 378, 395 (D. Del. 2011) (citing Boulden, 2007 WL 3378662, at *4).

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article published on a television station's website. Whitmarsh was interviewed in association with the article. The pertinent section from the article is as follows:

"For our purposes, we weren't looking to link him to a crime. We witnessed him committing a crime," said Corporal Jeff Whitmarsh from Delaware State Police.

Police say during the sweep, an officer smelt [sic] burnt marijuana coming from a bathroom stale [sic]. They say when the officer went in the student was flushing something down the toilet and that's when the canine dog sprung into action.

"Nobody was supposed to be there except police officers and the students were told to leave and he refused to comply . . . [sic] The circumstances let [sic] to him being arrested and being bite [sic] by the dog because he failed to comply to the orders, the lawful orders, of an officer," said Whitmarsh.

There is some factual wrangling over whether Plaintiff should be considered a "limited public figure" for the purposes of the defamation claim. Assuming *arguendo* that Plaintiff meets his prima facie case and that he is not a public figure, Whitmarsh is still immune pursuant to the State Tort Claims Act. As the Court noted earlier, under the State Tort Claims Act, a state actor is immune when an act or omission complained of:

(1) [A]rose out of and in connection with the performance of an official duty . . . involving the exercise of discretion . . . ; (2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and (3) The act or omission complained of was done without gross or wanton negligence.⁴⁸

At the time he made the statement to WMDT, Whitmarsh was acting as a

⁴⁸10 *Del. C.* § 4001.

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Delaware State Police Officer in the Public Information Office. Therefore, the statement was in connection with the performance of an official duty. An official duty involves an exercise of discretion when "there is no hard and fast rule as to [the] course of conduct that one must or must not take." Exactly how Whitmarsh responded to the inquiry was up to him, so the statement involved discretion. Plaintiff brought forth no evidence of bad faith on the part of Whitmarsh. In fact, the only knowledge that Whitmarsh had of the case came from reading the probable cause affidavit from Foraker. Whitmarsh had no actual contact with Foraker with regard to the Tilghman case. Whitmarsh's statements were made in the belief that the public interest would be best served thereby. An action or omission is considered wanton "only where it reflects a 'conscious indifference' or an 'I-don't-care attitude." There is no evidence whatsoever of gross or wanton negligence. The statement in question tracks Foraker's probable cause statement that Whitmarsh stated he reviewed for the interview. State Defendants' motion for summary judgment on the defamation claim is hereby granted.

Count VI- 42 U.S.C. § 1983 Claim

State Defendants move for summary judgement on all of Plaintiff's § 1983

⁴⁹*J.L. v. Barnes*, 33 A.3d 902, 914 (Del. Super. 2011) (quoting *Scarborough v. Alexis duPont High Sch.*, 1986 WL 10507, at *2 (Del. Super. Sept. 17, 1986)).

⁵⁰Whitmarsh Dep. at 12-13.

⁵¹*Id.* at 13.

⁵² Adams, 779 F. Supp. 2d at 395 (citing Foster v. Shropshire, 375 A.2d 458, 461 (Del. 1977)).

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claims. First, State Defendants argue that under *Heck v. Humphrey*,⁵³ participation in a probation before judgment program bars a subsequent § 1983 claim.⁵⁴ Plaintiff agreed to probation before judgment on the charge of resisting arrest. The *Heck* Court stated:

Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed ⁵⁵

Subsequently, in *Gilles v. Davis*, the Third Circuit applied *Heck* to Pennsylvania's Accelerated Rehabilitation Disposition program and concluded that "a § 1983 action that impugns the validity of the plaintiff's underlying conviction cannot be maintained unless the conviction has been reversed on direct appeal or impaired by collateral proceedings." A guilty plea and Probation Before Judgment have the same effect of barring a subsequent § 1983 claim under *Gilles*. In

⁵³512 U.S. 477 (1994).

⁵⁴Gilles v. Davis, 427 F.3d 197, 208-13 (3d Cir. 2005).

⁵⁵Heck, 512 U.S. at 487 (footnotes omitted).

⁵⁶Gilles, 427 F.3d 208-09.

⁵⁷*McDerby v. Daniels*, 2010 WL 2403033, at * 4 (D. Del. June 16, 2010) (citing *Gilles*, 427 F.3d at 209 n.8) (applying *Gilles* to Probation Before Judgment).

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reviewing Plaintiff's § 1983 claims, the Court must analyze whether those claims impugn the validity of the underlying Probation Before Judgment agreement on Plaintiff's resisting arrest charge.⁵⁸

In Delaware, the statute for resisting arrest states, "A person is guilty of resisting arrest when the person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person or another person or intentionally flees from a peace officer who is effecting an arrest." ⁵⁹

First, Plaintiff claims depravation of his liberty without due process in violation of his Fifth and Fourteenth Amendment rights. Although this claim could have been stated with greater specificity, Plaintiff appears to be claiming that his procedural due process rights were violated as well as his *Miranda*⁶⁰ rights. Plaintiff does not make very clear how his procedural due process rights were violated. The Court can only

⁵⁸Murdock v. Borough of Edgewater, 2011 WL 5320995, at *9-11 (D.N.J. Nov. 2, 2011). Notably, the United States District Court for the District of New Jersey found, "[P]laintiff's recovery, if any, on his section 1983 unlawful arrest claim would not 'necessarily imply' his state court conviction for resisting arrest because that conviction did not require a finding of lawful arrest." *Id.* at *10. The Court ruled, however, that a plaintiff's § 1983 claim for unlawful arrest placed in question whether officers had probable cause for his aggravated assault conviction, and thus the unlawful arrest claim was dismissed on summary judgment. *Id.* at *11.

⁵⁹11 *Del. C.* § 1257(b).

⁶⁰384 U.S. 436 (1966). The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." That Fifth Amendment privilege applied to state action through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). "Miranda extended that right to in-custody interrogation of a person suspected or accused of a crime and established a procedure to assure that custodial interrogations do respect that right." *Marine v. State*, 607 A.2d 1185, 1192 (1992).

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surmise that Plaintiff refers to his alleged four hour confinement in a holding cell.⁶¹ There are no facts that could possibly allow the Court to believe that this detention before being fingerprinted and heard by a judge,⁶² was a violation of Plaintiff's procedural due process rights.⁶³ As such, this claim is dismissed.

Assuming for the sake of argument that Plaintiff was under custodial interrogation, a violation of *Miranda* rights does not imply the invalidity of his resisting arrest Probation Before Judgment agreement since none of his statements appear to be a part of the resisting arrest charge.⁶⁴ Therefore, *Heck* and *Gilles* do not apply. However, because statements in alleged violation of *Miranda* were not used in a criminal case against Plaintiff, his right against self-incrimination and thereby his *Miranda* rights were not violated.⁶⁵ For the reasons stated above, this § 1983 claim cannot lie.

Second, Plaintiff claims that the alleged excessive force utilized by Foraker and

⁶¹Compl. ¶55.

⁶²Compl. ¶¶56-57.

⁶³See Heine v. Connelly, 644 F. Supp. 1508, 1516 (D. Del. 1986) (fourteen hour detention between arrest and hearing did not violate arrestee's constitutional rights).

⁶⁴Plaintiff's actions and the circumstances surrounding Plaintiff's arrest resulted in the resisting arrest charge, not his subsequent statements. Plaintiff's criminal trespass second degree charge was dismissed by *nolle prosequi*, and he was never charged with possession of marijuana.

⁶⁵See Chavez v. Martinez, 538 U.S. 760 (2003) (majority of the Court held that a law enforcement official's alleged coercive questioning of a suspect while suspect was under treatment for bullet wounds received from another law enforcement officer did not violate the Fifth Amendment's protection against self-incrimination without use of the statements in a criminal case against suspect).

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his K-9 infringed his substantive due process rights under the Fourteenth Amendment. With regard to this type of excessive force claim, the United States Supreme Court has ruled:

Today we make explicit . . . and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims. ⁶⁶

Under *Graham*, a § 1983 claim for excessive force cannot stand under substantive due process on these facts.

Third, Plaintiff states that his Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures were violated. The Court also reviews the substance of the excessive force claim under the Fourth Amendment as noted above. Again, Plaintiff is not nearly as specific as he should have been in articulating which facts go with which § 1983 claims. The Court surmises that the unreasonable search and seizure claim is connected to the allegation that Foraker unlawfully arrested him. The Court notes that although Delaware's Constitution provides more expansive protection from unlawful searches and seizures than the United States

⁶⁶Graham v. Connor, 490 U.S. 386, 395 (1989).

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Constitution,⁶⁷ a § 1983 claim is a method of vindicating federal rights.⁶⁸ As such, Delaware's more expansive protection is not implicated here. Assuming the facts in the light most favorable to Plaintiff, Foraker entered the bathroom and simultaneously announced the presence of the K-9 unit. Plaintiff did not answer this announcement. Upon entry, his K-9 went to the back stall and proceeded under the door and did not come back out. The toilet flushed. Foraker went to the stall and found the door locked. After forcing the door open, he found his K-9 on Plaintiff's leg. Given the facts as the officer knew them,⁶⁹ he had probable cause to suspect that Plaintiff was a trespasser.⁷⁰ Thus, Foraker's seizure and subsequent search did not violate Plaintiff's Fourth Amendment right to be free of an unlawful search and seizure.

Fourth, Plaintiff also appears to offer a § 1983 claim that his Fourth Amendment protection against unreasonable searches and seizures was violated when

 $^{^{67}}$ See Del. Const. art. I, §6; *Jones v. State*, 745 A.2d 856 (Del. 1999); Randy J. Holland, The Delaware State Constitution: A Reference Guide 36-37 (2002).

⁶⁸ Albright v. Oliver, 510 U.S. 266, 271 (1994).

⁶⁹DSU Security Officer Kevin Burns, who was in charge of clearing the building, told Foraker that the building was secure and that all unauthorized persons had been removed. Burns Dep. at 25-44; Foraker Dep. at 68. Plaintiff contends that no one knocked on the men's bathroom door, or checked his stall in contradiction with Foraker and Burns. Nonetheless, Plaintiff does not contest Burns's statement that he told Foraker that the building was clear of unauthorized persons. Plaintiff also admits that he said nothing upon Foraker's announcement of the K-9's entry. Upon entry to the bathroom, to the knowledge of the officer, any person present was a trespasser. Foraker, therefore, had probable cause that a crime was being committed.

⁷⁰"The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

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the K-9 bit him in the bathroom stall. The Court finds this claim to be addressed by the analogous case *Cornish v. Delaware State Police*.⁷¹ In that case, a DSP K-9 bit an innocent bystander.⁷² The injured party sued under state tort law and under § 1983 for excessive force.⁷³ The Court ruled that the injured party had not been "seized" within the meaning of the Fourth Amendment in that he was not the intended object of physical restraint by an agent of the state.⁷⁴ Here, Foraker had no knowledge of Plaintiff's presence in the stall until after he had been bitten. Foraker had no intention that his K-9 seize Plaintiff.

Plaintiff's § 1983 excessive force claim is not entirely addressed by *Cornish* in that Plaintiff appears to allege excessive force in Foraker's pulling Plaintiff out of the bathroom stall with the K-9 still attached. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Unfortunately for Plaintiff, in judging what was a reasonable use of force in that situation, Plaintiff's Probation Before Judgment for resisting arrest is directly implicated. The Court cannot ignore the mandate of *Heck* and *Gilles*. Therefore, the excessive force claim cannot stand.

Sixth, paragraphs 107 and 108 of Plaintiff's complaint appear to restate several

⁷¹¹⁹⁹⁶ WL 453304 (Del. Super. June 19, 1996).

⁷²*Id.* at *1.

⁷³*Id.* at *3-*5.

⁷⁴Id. at *5 (citing Brower v. Cnty of Inyo, 489 U.S. 593 (1989)).

⁷⁵ Graham, 490 U.S. at 396.

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of Plaintiff's state tort claims as § 1983 claims without specifying what rights are implicated in addition to the rights already analyzed. The Court believes that these paragraphs are "a thinly veiled attempt to assert a cause of action for a basic tort disguised as a § 1983 claim." Having addressed all of Plaintiff's § 1983 claims, the Court will not indulge in further speculation invited by paragraphs 107 and 108.

Delaware State Police Trooper "John Doe"

State Defendants contend that claims against "Second Delaware State Police Trooper, John Doe" should be dismissed as there is no Delaware statute or Court rule that permits filing and prosecution against a "John Doe" defendant.⁷⁷ Plaintiff grudgingly notes that he does not believe that State Defendants have standing for such a motion, but he recognizes the principle of law and does not contest the issue. As such, State Defendants' motion for summary judgment regarding Delaware State Police Trooper "John Doe" is hereby granted.

Application of the Dog Bite Statute, 9 Del. C. § 913

In a two paragraph letter to the Court on March 21, 2012, Plaintiff asserted an additional claim for strict liability under 7 *Del. C.* § 1711, which was later found to have been moved to 9 *Del. C.* § 913 ("Dog Bite Statute"). The theory had not been mentioned up to that point in the litigation. Mention of this claim was after Plaintiff's complaint, his response to the motions for summary judgment, the oral argument for

⁷⁶Nagy v. New Castle Cnty., 1989 WL 63967, at *6 (Del. Super. June 2, 1989); see Paul v. Davis, 424 U.S. 693, 711-12 (1976) (injury to reputation did not state a Fourteenth Amendment Due Process claim).

⁷⁷*Mohl v. Doe*, 1995 WL 339099, at *1-2 (Del. Super. May 11, 1995).

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the summary judgment motions, and several pretrial stipulations. The Court construes Plaintiff's letter to be a motion to amend the complaint.⁷⁸ "In the absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend."⁷⁹ On March 26, 2012, the Court requested that additional briefing be completed within 60 days. The parties complied with the request.

Although the Court believes that its request for additional briefing and continuance of the trial in this matter have dissipated any prejudice that State Defendants may have suffered from this tardy application, the Court cannot flatly ignore State Defendants' meritorious argument with regard to the scheduling order in this case. The Court entered a scheduling order on March 1, 2012. The scheduling order contained a November 23, 2011 deadline for filing motions to add or amend.

The Delaware Supreme Court stated in *Sammons v. Doctors for Emergency Services*, *P.A.*, "The purpose of the Rule 16 scheduling order and discovery deadlines are to improve the efficiency of trials. . . ."80 The *Superior Court Kent County Civil Case Management Plan* states in pertinent part, "Extensions of time limits . . . may be granted only upon a showing of good cause Requests for extensions of time

⁷⁸"Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Super. Ct. Civ. R. 15(a).

⁷⁹*Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993).

⁸⁰913 A.2d 519, 530 (Del. 2006).

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limits set forth in a scheduling order must be made at least 10 days prior to the expiration of time."⁸¹ The Delaware Supreme Court noted, "Good cause is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party."⁸²

The motion to amend came slightly under 4 months after the deadline. Although the moving party has been generally diligent, on this particular motion, the Dog Bite Statute at issue has been existence in its present form for over ten years. The claim under the Dog Bite Statute was entirely foreseeable. However, given the risk of unfairness to the Plaintiff, the Court carries out a full analysis with respect to the Dog Bite Statute. The Court concludes that the Dog Bite Statute does not apply here.

The Court does not believe that the Dog Bite Statute applies to police K-9 units. The current version of the statute states:

The owner of a dog is liable in damages for any injury, death or loss to person or property that is caused by such dog, unless the injury, death or loss was caused to the body or property of a person who, at the time, was committing or attempting to commit a trespass or other criminal offense on the property of the owner, or was committing or attempting to commit a criminal offense against any person, or was teasing,

⁸¹Superior Court Kent Cnty. Civil Case Mgmt. Plan, Superior Court of Kent Cnty. 7 (2006).

⁸²Coleman v. PricewaterhouseCoopers, LLC, 902 A.2d 1102, 1107 (Del. 2006) (quoting 3 James Wm. Moore, et al., *Moore's Federal Practice* § 16.14(1)(b) (3d ed. 2004)).

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tormenting or abusing the dog.83

This statutory language was created in 1998 in response to "well-publicized and shocking problems caused by people who were irresponsibly keeping vicious dogs as pets."⁸⁴ The General Assembly's intent was to eliminate the "one free bite" rule, which made the owner of a vicious dog liable only if he or she had knowledge of the dog's dangerous propensities.⁸⁵

In applying a statute, the fundamental rule is to find and give effect to the Legislature's intent. When a statute is unambiguous, application of the Legislature's intent is simple as the Court looks to the literal meaning. A statute may be construed as ambiguous, however, when "giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that . . . could not have been intended by the legislature." As the United States Supreme Court once noted, "[T]he general words of a statute do not include the government or affect its rights unless the construction be clear and

⁸³9 *Del. C.* § 913.

⁸⁴Brady v. White, 2006 WL 2790914, at *3 (Del. Super. Sept. 27, 2006).

⁸⁵*Id.* at *4.

⁸⁶Coastal Barge Corp. v. Coastal Zone Indus. Control Bd., 492 A.2d 1242, 1246 (Del. 1985) (citation omitted).

⁸⁷*Id.* (citation omitted).

⁸⁸*Id.* (citations omitted).

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indisputable upon the text of the act "89

Here, Plaintiff urges the Court to apply the Dog Bite Statute, which would impose strict liability, to all dogs and all dog owners, including State Defendants, ignoring the statutory regime created by the State Tort Claims Act. The State Tort Claims Act conclusively establishes how and when the State lowers its shield of sovereign immunity. To argue that the Dog Bite Statute would bypass this well-known statutory regime without so much as a word, is unreasonable.⁹⁰

Furthermore, to interpret the Dog Bite Statue in such a fashion would be in contravention of the General Assembly's clear purpose: to rein in irresponsible dog owners who were keeping vicious dogs as pets by eliminating the "one free bite" rule. The K-9 Speed was not a pet. Rather, the dog was chiefly used for a law enforcement purpose. Therefore, for the reasons above, the Court will not apply the Dog Bite Statute to dogs that are State-owned or are in State service. Plaintiff's motion to amend is therefore denied since the Dog Bite Statute does not apply to State Defendants.

Next, DSU moves for summary judgment on all of Plaintiff's counts as well as for its costs in defense of this action. Each count is addressed in turn. Before proceeding, however, a brief discussion is necessary with regard to the designation

⁸⁹Nardone v. United States, 302 U.S. 379, 383, 58 S.Ct. 275, 277, 82 L.Ed. 314 (1937).

⁹⁰See Audette v. Commonwealth, 829 N.E.2d 248 (Mass. App. Ct. 2005); Blais v. Town of Goffstown, 406 A.2d 295 (N.H. 1979); Abelseth v. City of Gillette, 752 P.2d 430 (Wyo. 1988).

⁹¹Plaintiff attempts to create an issue out of who holds title to the K-9 Speed. This makes no difference to the Court's analysis.

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of Plaintiff as a trespasser or a business invitee. State Defendants and DSU contend that Plaintiff was a trespasser as Memorial Hall had been "locked down" to the public for the K-9 search. Plaintiff points out that he was a full-time student with his student identification card and no warning signs were posted indicating that use of Memorial Hall was restricted.⁹² There is also a dispute as to how many warnings were given before the K-9 entered the men's restroom. Viewing the facts in the light most favorable to the non-moving Plaintiff and with all reasonable inferences drawn in his favor, he is deemed a business invitee for the purposes of this motion.

Count I-Negligence

_____DSU contends that it met its duties to Plaintiff as a business invitee under the Restatement (Second) of Torts § 344.⁹³ The Delaware Supreme Court has utilized the Restatement (Second) for landowners when the actions of third persons are involved.⁹⁴ In light of this fact, the Restatement (Second) of Torts § 344 states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

⁹²Pl. Resp. Exs. C and D.

⁹³(1965).

⁹⁴ See Furek v. Univ. of Delaware, 594 A.2d 506 (Del. 1991).

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DSU contends that visual inspections and loud announcements satisfies § 344. Nevertheless, Plaintiff contends that he heard only one announcement as the door to the bathroom was slammed open. There is a genuine issue of material fact as to the adequacy of this announcement as a warning to the Plaintiff and the number of announcements.

With regard to construing Foraker as a borrowed servant, the common law borrowed servant doctrine states:

The general rule is that an employee, with his consent, may be loaned by his general employer to another to perform specific services, and that, in the course of and for the purpose of performing such services, he may become the employee of the specific employer rather than the employee of the general employer. Accordingly, a loaned employee may become the specific employer's employee while at the same time remaining, generally speaking, the employee of him who loans his services. ⁹⁶

Insofar as the borrowed servant doctrine may apply to this case, it is a question of fact to be decided by the jury. 97

DSU's motion for summary judgment on this count is hereby denied.

Count II-Assault and Battery

_____DSU states that there are no facts of record suggesting that it made contact or attempted to contact Plaintiff. Plaintiff responds that there is evidence that Foraker

⁹⁵Pl. Resp. Ex. A.

⁹⁶Volair Contractors, Inc. v. AmQuip Corp., 829 A.2d 130, 134 (Del. 2003) (citing Richardson v. John T. Hardy & Sons, Inc., 182 A.2d 901, 902 (Del. 1962)).

⁹⁷Volair Contractors, Inc., 829 A.2d at 136; Richardson, 182 A.2d at 902.

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was an agent or servant of DSU. "The determination of whether an agency relationship exists is normally a question of fact." As noted above, however, there is no evidence of intentional conduct that is a necessary element for assault and battery. Therefore, as State Defendants' motion for summary judgment was granted, it is also granted for DSU.

Count III-False Imprisonment

_____DSU states that there are no facts of record to support DSU involvement in any actions after DSP took custody of Plaintiff. The record supports this assertion, and as noted in the State Defendants' motion, *Boulden v. Turner* stands for the assertion that when a lawful arrest has been made, an action for false imprisonment will not lie. ⁹⁹ The arrest at issue was pursuant to an arrest warrant. Even if Foraker is construed as a servant, as a matter of law, an action for false imprisonment cannot be found on these facts. Therefore, DSU is entitled to summary judgment on this count.

Count IV-Intentional Infliction of Emotional Distress

_____DSU notes that there is no evidence of record from which a jury could find extreme and outrageous conduct necessary for the prima facie case of intentional infliction of emotional distress. The Court finds that DSU's liability hinges on its alleged agency relationship with Foraker. If an agency relationship is fulfilled, liability then depends upon whether Foraker's conduct was at least reckless and

⁹⁸Fisher v. Townsends, Inc., 695 A.2d 53, 62 (Del. 1997) (citing Gooden v. Mitchell, 21 A.2d 197, 201 (Del. Super. 1941)).

⁹⁹Boulden v. Turner, 2007 WL 3378662, at *4 (Del. Super. Apr. 12, 2007).

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sufficiently outrageous for recovery under this theory. ¹⁰⁰ As noted earlier, the agency relationship ¹⁰¹ and applicability of the borrowed servant doctrine ¹⁰² are matters for the jury. Viewing the facts and reasonable inferences in the light most favorable to the non-moving Plaintiff, Foraker's conduct could not be construed as intentional but could be construed as reckless. With all of this in mind, there exists a genuine issue of material fact, and summary judgment is denied on this count.

Count V–Defamation/Libel/Slander

_____The defamation alleged by Plaintiff surrounding a WMDT television news report and web site article and a Dover Post newspaper article does not appear to have any cognizable connection with DSU. There are no facts to support an allegation that Foraker or Whitmarsh were acting as agents of DSU at the points in time of the alleged defamatory acts. With no genuine issue as to any material fact, this count is ripe for summary judgment. Summary judgment is hereby granted for DSU on this count.

Count VI-42 U.S.C. § 1983

DSU asserts that Plaintiff's complaint makes no allegations of actions by DSU related to civil rights violations. Again, as noted above, DSU could be subject to vicarious liability if Foraker is found to be a servant of DSU by the finder of fact.

 $^{^{100}}See\ Goode\ v.$ Bayhealth Medical Center, Inc., 931 A.2d 437, 2007 WL 2050761, at *2 (Del. 2007) (TABLE).

¹⁰¹ Fisher, 695 A.2d at 62 (citing Gooden, 21 A.2d at 201).

¹⁰²Volair Contractors, Inc., 829 A.2d at 136; Richardson, 182 A.2d at 902.

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Because the Court has granted State Defendants' motion for summary judgment on

this count, however, even if Foraker was found to be an agent of DSU, he has no

liability under this theory as a matter of law. As such, DSU's motion for summary

judgment is granted for this count.

CONCLUSION

State Defendants' motion for summary judgment is granted as to Plaintiff's

claims for assault and battery, false imprisonment, defamation, and violation of 42

U.S.C. § 1983. State Defendants' motion is denied as to negligence and intentional

infliction of emotional distress in the manner described above. All claims against

DSP Trooper "John Doe" are dismissed. Plaintiff's motion to amend the Complaint

is denied.

DSU's motion for summary judgment is granted as to assault and battery, false

imprisonment, defamation, and the § 1983 claim. DSU's motion is denied as to

negligence and intentional infliction of emotional distress. DSU's motion for costs

is deferred until completion of trial.

IT IS SO ORDERED.

/s/ William l. Witham, Jr.

Resident Judge

WLW/dmh

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